Supreme Court, U.S.
FILED

No. 931274

JAN 14 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARSHALL J. KAGAN,

Petitioner

versus

EL SAN HOTEL & CASINO, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED FOR REVIEW

An employee of a company operating under the supervision of the Bankruptcy Court, discovers that the Trustees and their attornies are corrupt criminals, stealing from the estate, and protecting each other. He has them removed from office, charged, convicted, and in one case imprisoned, for their wrongdoing.

In retaliation, they fire him and blackball him, preventing him from working for several years.

A) Should an employee of a company operating under Bankruptcy Court supervision, when confronting crime, have to choose between remaining silent, or being punished in retaliation?

B) If federal statutory law offers no remedy, is this an appropriate situation for the application of federal common law?

(The Seventh Circuit, applying this Court's guidelines says yes. The First and Fourth Circuits say no. Courts in 33 states applying parallel state law say yes).

LIST OF ALL PARTIES

Petitioner - Marshall J. Kagan

Respondents - Estate of El San Juan Hotel

Hans Lopez Stubbe, et al

(successor trustee)

Rodrigo Otero Bigeles, etal

(successor trustee's attorney)

NOTE: Hector Rodriguez Estrada, was the former trustee, and a defendant when the case was filed. However at the time the case came to trial, he had already been imprisoned for the acts related in this case. He did not notify the Bankruptcy Court of his new address in the Federal Prison system, and was not notified of the proceedings. The Bankruptcy Court severed him from the trial. After the trial, and while the case was being appealed, the Bankruptcy Court acknowledged its error, and defaulted Rodriguez. Since Rodriguez is still

serving his 18 year sentence, and already has multi-million dollar judgements that far exceed any assets, no practical purpose would be served by attempting to reintroduce him to the case at this point.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARSHALL J. KAGAN,

Petitioner

versus

EL SAN HOTEL & CASINO, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Marshall J. Kagan respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the First Circuit, entered in the above entitled proceeding on September 9, 1993.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, and the order denying a rehearing is reprinted in the Appendix.

JURISDICTION

This petition is timely filed, as the judgement was entered on September 9, 1993, and a petition for a rehearing was denied on October 18, 1993.

The jurisdiction of this Court to review the judgement of the First Circuit is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Title 11, U.S. Code of Bankruptcy

(The parties in this case were involved in the administration of a company operating under Chapter 11 of the Bankruptcy Code. The main reference to

the code in this case, will be that the code does not provide the remedy sought).

STATEMENT OF THE CASE

Petitioner Kagan, a CPA, was the Controller of the El San Juan Hotel, when it filed under Ch XI in the Bankruptcy Court. Hector Rodriguez Estrada, was appointed Trustee. He mismanaged, stole money from the estate, and filed false tax and court reports.

Kagan confronted him, and demanded he stop his illegal acts, restore the stolen money and file corrected reports. Rodriguez not only refused, but instead insisted that Kagan testify before a Puerto Rico House of Representatives committee investigating the hotel, and tell them that his management was honest and efficient. When Kagan refused to commit such perjury, and took action to report the illegal activities, Rodriguez fired him.

Kagan organized a creditors' meeting, at which Rodriguez was voted out of office. He was replaced by a successor trustee, Respondent Lopez, and his attorney, Respondent Otero. The evidence of Rodriguez's crimes and mismanagement were presented to them by Kagan. After reviewing the evidence, they declared that Rodriguez was innocent, and presented this conclusion to the Bankruptcy Court in a formal report.

The reason for this conclusion was soon uncovered. **RODRIGUEZ HAD HIRED OTERO AS HIS ATTORNEY, AT THE SAME TIME OTERO WAS, "INVESTIGATING," HIM ON BEHALF OF THE HOTEL ESTATE.**

Otero violated Sec 327 of the Bankruptcy Act which prohibits such conflicts of interest, as well as the Bar Association Code of Professional Ethics. Lopez approved of Otero's acts.

Eventually other creditors and the IRS, acting on Kagan's evidence, despite Lopez and Otero's objections brought charges against Rodriguez. Civil judgements of $2 million were awarded, and he was convicted of theft and perjury, and is incarcerated serving an 18 year sentence.

Despite Rodriguez's conviction, Lopez and Otero continue to maintain that Rodriguez was correct to fire Kagan, and would only give him bad references. As a result, Kagan remained unemployed for 3 years.

When Otero's corruption in working for Rodriguez while, "investigating" him, was revealed, Federal Judge Fuste, forced Lopez to fire him. Charges of prejury, and motions to disgorge and forfeit fees are still pending against Lopez and Otero.

COURSE OF THE PROCEEDINGS

The case started in the Bankruptcy Court, and on motion of the defendants was transferred to the District Court, where after several years it was transferred back to the Bankruptcy Court.

The Bankruptcy Court ruled that Kagan had been wrongfully dismissed, and awarded him $7,000, the amount allowed under Puerto Rico Law 80. Claims for additional damages against Lopez, Otero and the estate, for the bad references that Lopez and Otero provided Kagan were dismissed, because the Court decided it lacked jurisdiction over corruption in the Bankruptcy Court.

The District Court affirmed the wrongful dismissal award. The Court disagreed with the Bankruptcy Court's decision that it lacked authority to decide matters involving corruption in

the Bankruptcy Court. Instead the Court substituted the standard of the, "reasonable employer," and found that reasonable employers had no duty to provide correct references. (The decision did not address the question if employers had a duty not to provide false references).

The Court of Appeals also affirmed the wrongful dismissal decision. It found no grounds for additional relief under state or federal statutory law.

As to federal common law, the Court, disagreeing with the Seventh Circuit, found no basis for application in such situations.

Jurisdiction in the court of first instance is under 28 USC 1334 and 28 USC 157.

REASONS FOR GRANTING THE WRIT

a) The, " Public Policy" Doctrine

The "Public Policy" Doctrine is based on the assumption, that when a Legislature passes a law, it wants that law obeyed. Acting on that premise, Courts in 33 states have fashioned common law remedies protecting individuals who were punished for refusing to commit crimes, reporting crimes, or just obeying the law. (See LABOR LAW JOURNAL, Jan 1988, pg 20, article by David Holmes, law professor).

The most common situations involve employees, because employers have the power to retaliate. But, there are other instances, such as board members removed from office, and tenants evicted by their landlords.

Courts reasoned that if a person could be punished for obeying the law, it would undermine the law. Since this doctrine has been widely applied under state common law, we will review this area first. Then the more limited use under federal common law and this Court's guidelines for federal common law will be discussed.

b) "Public Policy" in the State Courts

The first major case involved an employee, who was dismissed for refusing to obey his employer's instructions to commit perjury, but instead testified truthfully. The Court explained, in "Peterman v Intl Brotherhood of Teamsters, (174 Cal App 2d 184, 188, 1959):

> "The commission of perjury is unlawful ...It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to

> discharge any employee... on the ground that the employee declined to commit perjury, an act specifically enjoined by statute...The public policy of this state, as reflected in the Penal Code sections referred to above would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonius act at the insistence of his employer would be to encourage criminal conduct upon the part of both the employee and employer, and serve to contaminate the honest administration of public affairs."

In Tameny v Atlantic Richfield Co. 164 Cal Rept. 839, 610 P2d 1330 Sup Ct of Cal, 1980) the employee was fired for refusing to participate in an illegal scheme to fix retail gasoline prices. The court decided:

> "We hold that an employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging

in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer."

In Jackson v Mindoka, (98 Idaho 330, 563 P2d 54, 1977) the Idaho Supreme Court stated the doctrine in the following fashion, although it declined to apply it under the particular facts of the case:

"As a general exception to the rule allowing either the employer or the ewmployee to terminate the employment relationship without cause, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."

In Harless v First Natl Bank in Fairmont (246 SE 2d 270, Sup Ct of Appls of W Virginia), an employee was discharged because he objected to his employer's actions in overcharging customers in violation of West Virginia law. This was the first case decided by a

state court in favor of a, "corporate whistleblower." He was awarded $125,000 in compensatory and punitive damages. Significantly the executive responsible for the discharge was ordered to pay a larger share, $75,000; $10,000 for the act of firing, $40,000 for, "outrageous conduct causing emotional distress" and $25,000 for blackballing." (bad references).

In a landlord-tenant case, Schweiger v Superior Court of Alameda County (3 Cal3d 507, 90 Cal Rptr 729, 476 P2d 97, 1970) stated:

> "Both Glenn and Peterman persuasively instruct us that one may not exercise normally unrestricted power if his reasons for its exercise contravene public policy. Clearly sections 1941 and 1942 express the policy of this state that landlords in the interest of public health and safety have the duty to maintain leased premises in habitable condition and that tenants have the right after notice to the landlord, to repair dilapidations and deduct

> the cost of repairs from the rent. The policy expressed in these sections cannot be effectuated if landlords may evict tenants who invoke the provisions of the statute. Courts, would be withholding with one hand what the legislature has granted with the other if they order evictions instituted in retaliation against the exercise of statutory rights."

Another case was about an employee not going to work, because she was summoned to jury duty. Her employer fired her for missing work. The Court after reviewing the statutes concerning jury duty, found that there was a substantial, "public policy" favoring jury duty. Accordingly, the employee was found to have a cause of action against her employer. Ness v. Hocks (272 OR 210, 536 P2d 512, 1975).

Virtually all the state courts that have ruled on, "public policy" cases in the last 20 years, have favored the doctrine. In some case legislatures have

later codified the doctrine for certain situations.

c) The Supreme Court Guidelines

In several decisions, this Court has ruled on whether or not federal common law was applicable. None of the decisions involved, "Public Policy" as discussed here. However, two principles emerged, which the Circuit Courts are using as guidelines. Unfortunately, they come to opposite conclusions.

We will briefly review the Circuit Court cases, then the Supreme Court guidelines, and then see where the Circuits differed.

The Seventh Circuit case, Barany v Butler, 670 F2d 726, 1982, involved members of a federal credit union's credit committee who were removed from office, because of their insistence that federal credit union laws restricting

loans to non-members be obeyed. The Court found that they had no private right of action under existing credit union laws, but they did have a cause of action under federal common law.

The Fourth Circuit case, Ridenour v Andrews Federal Credit Union 897 F2d 715 (1990), concerned credit union employees, who were terminated for attempting to uphold federal laws. The decision found they had no cause of action under federal common law. The 4th Circuit specifically disagrees with the 7th Circuit's *Barany* decision:

> "We respectfully disagree with the contrary holding of the Seventh Circuit in *Barany*."

The First Circuit, in the case at bar, also found no grounds for a federal common law remedy, for an employee dismissed and blackballed for upholding the law.

The current analysis of federal common law starts with Erie RR v Tompkins, 304 US 64,78,58 S Ct. 817,822, 82 Led 1188 (1938) finding, that though there is, "no federal general common law," there is a recognized, "need and authority" for federal courts to create specific federal common law in some carefully limited circumstances.

Justice Jackson in discussing situations in which no federal statute clearly applies, stated:

> "whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common law sources....(To say that federal courts have no general common law) is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all the source materials of the common law, ...
>
> Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all complete statutory codes, and

is apparent from the terms of the Constitution itself."

D'Oench, Duhme & Co. v FDIC, 315 US 447, 468-470, 62 S.Ct. 676, 684-685, 86 LED 956 (1942) See also Clearfield Trust Co. v United States, 318 US 363,367, 63 S.Ct. 573, 575, 87 LEd 838 (1943):

"In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

In later Supreme Court decisions, two requirements, have emerged for the application of federal law.

First, where, "necessary to protect uniquely federal interests," Banco Nacional de Cuba v Sabbatino 376 US 398,426, 84 S.Ct 923, 939, L.Ed 2d 804 (1964).

Second, the absence of a statutory remedy in existing legislation. Illinois II, 101 S.Ct at 1791 n.8, Northwest Airlines, 101 S. Ct. 2068.

1. "Uniquely federal interest"

In *Barany*, the Court traced the history of credit unions in the nation, some state chartered, some federal chartered, the problems of obtaining economical consumer loans, the effect on the economy, and finally the need for increased federal regulation, to establish the, "uniquely federal interests."

In *Ridenour*, there is no review made of the federal credit union system as in *Barany*. Instead, reliance is placed on the omission of federal credit unions from areas where the Supreme Court has previously found, "uniquely federal interests," i.e. cases involving,

"the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations and admiralty.. " Texas Industries, 101 S. Ct. 2067

In the case at bar, the First Circuit took the same tack as the *Ridenour* Court, i.e. if the Supreme Court hasn't specifically included it, it is excluded.

However, the Bankruptcy Court system is exclusively a federal creation. Its control over the finances of thousands of large businesses, and hundreds of thousand individuals, and its staffing by federal personnel, make it at least as worthy of designation as a, "unique federal interest" as the federal credit union regulatory system.

2. **Absence of Statutory Remedy**

In *Barany*, the Seventh Circuit reviewed the Supreme Court decisions in Northwest Airlines101 S.CT. 1581, and Texas Industries101 S.Ct. 2068. The principle that emerged, was that the existence of a **comprehensive statutory**

remedial scheme would be a bar to federal common law relief. *Barany*, drawing on Northwest Airlines 101 S.Ct, 1584 expressed the point:

> "..where a federal common law remedy is asserted and there is a pertinent federal statute with an integrated system of remedies which omits that remedy, we must presume that Congress_deliberately omitted the asserted remedy. In that case we may not fashion new remedies that upset the legislative scheme."

In federal credit union legislation, there was provision for review and remedy for board members who were removed by the National Credit Union Board, but not for those removed by the local board. *Barany*, in the absence of any contrary legislative intent, assumed this was not a complete integrated system, and therefore was not a bar to federal common law. *Barany*, concluded:

> "Thus statutory remedies which do not afford aggrieved parties at least a reasonable facsimile of the relief sought under federal common

law, do not preclude federal common law remedies."

In *Ridenour*, the Fourth Circuit concluded that the legislation covering remedies for removed credit union board members was extensive enough to be a complete system, and therefore it should be assumed that lack of review for board members removed by local boards was a deliberate legislative omission.

Since the Bankruptcy Act, does not have anything close to a complete remedial system, this point should not be relavent to the case at bar. However, the First Circuit took another tack. Noting that Congress has passed protective legislation for whistleblowers in other areas, e.g. defense contractors, the Court maintains, "that Congress has not though appropriate," to provide such protection for persons covered by the Bankruptcy Act.

But, this approach does not reflect the reality of how Congress passes laws. Typically, each area is studied and legislated independently. It would be an impossible leap, to assume, that when Congress passed protection for whistleblowers in connection with defense contractors, they had even considered the Bankruptcy System, let alone decided not to provide protection in that area.

d. Other factors in this case

The First Circuit raised several other points, in the decision in this case. First it was claimed that there is no need for uniformity in Bankruptcy law, because state law is often used, as contrasted to federal credit unions that only use federal law. This is not correct, as federal credit unions often utilize state law in the same manner as

the Bankruptcy Courts, for example in deciding property rights.

Second, it was claimed that the *Barany* decision applied only to federal credit unions, and was no precedent for the Bankruptcy Court. While legislation cannot jump between federal areas, judicial principles can and do.

Third it was asserted that federal ommon law can only be applied when necessary federal interests are in conflict with state law. We interpret this simply to mean that if state law does not provide a remedy that will support the federal interest, (in this case upholding federal laws), then federal common law may be applicable. In the present case the First Circuit decided that state law did not provide a remedy that would support the federal interest. (We disagree with some of the

Court's findings relative to state law, e.g. refusal to consider the doctrine of compelled self defamation, and conclusion that certain issues had not previously been raised. However, these points are not subject to review here. We simply start with the Court's conclusion that state law does not provide a remedy to support the federal interest).

Fourth, the Court mistakenly assumed that the claim under federal common law applied only to the estate. It applies to all the defendants.

CONCLUSION

The, "Public Policy" doctrine has won acceptance in most states, and some federal courts, because of its inherent logic. If the Legislature makes laws, it wants them obeyed. To encourage compliance, citizens should be protected

from retaliation for obeying the laws, or reporting violations.

Since federal and state statutory laws, often do not provide such protection, state common law is appropriate to uphold state laws, and federal common law to uphold federal laws, applying this Court's guidelines.

Without such a remedy, the corrupt trustee's and attornies who were exposed by Kagan, and removed from office will have the last laugh. Kagan, "got them" but after all, they broke the law. They have been able to retaliate by firing him and giving him bad references that crippled a 30 year career as a CPA. The criminals sit in jail laughing, while Kagan has to explain to family and friends, that yes, he put the bad guys behind bars, but the courts believe that

its quite allright for the criminals to punish him in retaliation.

A review of this case will resolve the differences between the circuits. **This in turn, could substantially raise the level of compliance with federal law,** as lawbreakers are deprived of a weapon to compel silence, or pressure individuals to join them in breaking the law. Lawbreakers will no longer be able to retaliate with impunity.

What will this case tell citizens who come upon crime and corruption? "Close your eyes, or prepare to get hurt." Or, **"If you uphold the law, the law will protect you from retaliation."**

Respectfully submitted

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December 31, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1202

MARSHALL J. KAGAN
Appellant,

v.

EL SAN JUAN HOTEL CORPORATION, ET AL.,
Appellees.

Before

Breyer, Chief Judge
Torruella, Selya, Cyr, Boudin and Stahl,
Circuit Judges

ORDER OF COURT

Entered October 18, 1993

The petition for rehearing with the suggestion for rehearing en banc is denied.

By the Court:

Francis P. Scigliano
Clerk

September 9, 1993 [NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1202

MARSHALL J. KAGAN,

Apellant,

v.

EL SAN JUAN HOTEL & CASINO, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, U.S. District Judge]

Before

Cyr, Boudin and Stahl,
Circuit Judges.

Marshall J. Kagan on brief pro se.
Daniel R. Dominguez, Marie E. Lopez-Adames and Dominguez &Totti on brief fo appelees El San Juan Hotel Corp. & Hans Lopez Stubbe.
Carlos A. Quilichini and Ramon Lloveras Otero on brief for appellee Rodrigo Otero Bigles.

Per Curiam. Appellant Marshall J. Kagan appeals the district court order affirming an order of the bankruptcy court. The district court found that Kagan's sole remedy for alleged harm following upon his dismissal from his position as comptroller of the El San Juan Hotel was pursuant to the Puerto Rico wrongful termination statute, 29 L.P.R.A. 185a. The court dismissed his other claims for relief. We affirm.

The factual as well as the procedural background to this case are complex. We summarize from the facts found below. See Kagan v. San Juan Hotel Corp., 149 B.R. 263 (D.P.R. 1992)

Kagan was comptroller of the El San Juan Hotel when it filed for bankruptcy under Chapter 11 in 1980.

Kagan continued in his position under the court appointed bankruptcy trustee, Hector Rodriguez Estrada. After frequent disagreements between Kagan and Rodriguez as to how the estate should be managed, appellant was dismissed for unsatisfactory performance in December 1982. Kagan asserts that he was dismissed in retaliation for attempting to have the trusteeship of Rodriguez investigated.

In March 1983, the Chapter 11 proceeding was converted to a Chapter 7 proceeding. In September 1983, Rodriguez was removed from the trusteeship by a unanimous vote of the creditors and replaced by appellee Lopez. Kagan urged Lopezorney, to file suit against Rodriguez for abuse of his position. When they refused to file suit

alleging that there was insufficient evidence against Rodriguez, Kagan accused Lopez and Otero of covering for Rodriguez. In 1985 suit was filed against Rodriguez by the United States as one of the estate's creditors. Rodriguez was found to have abused his trusteeship and a judgment of over 2 million dollars was imposed on Rodriguez on behalf of the estate. In Re San Juan Hotel Corp., 71 B.R.413 D.P.R. 1987), aff'd in part and rev'd in part, 847 F.2d 931 (1st Cir. 1988). Subsequently Rodriguez was convicted and sentenced for fraud.

Kagan commenced suit against the estate and Rodriguez in March 1983. Kagan sought both compensation for wrongful termination and the removal from his personnel file of a letter indicating that he had been

terminated for poor performance. When Lopez replaced Rodriguez, Kagan amended his suit and sought compensation, removal of the negative letter and a new letter of reference from Lopez and Otero. Although Lopez agreed to compensation for wrongful termination, he refused to remove the old letter or write a new one. Kagan asserts that the failure to remove the old letter from his file and to provide a new "corrected" letter prevented him from obtaining new employment for several years and then resulted in his being compelled to accept a position at lower wages than he had previously earned.

Kagan's suit "wend[ed] a torturous path through the judicial system." Kagan, 149 B.R. at 268. Trial in the bankruptcy court did not commence until May 1988. In September 1990 the

bankruptcy court dismissed all claims against Lopez and Otero and allowed Kagan damages against the estate pursuant to 185a. The final order of the bankruptcy court did not issue until March 23, 1992. Kagan appealed the dismissal of his claims other than that under 185(a) to the district court which affirmed.

On appeal to this court, Kagan seeks damages against Lopez and Otero for the failure to provide him with a new letter of reference. He also seeks additional damages from the estate for his wrongful dismissal.1

1. In his prayer for relief, Kagan asks this court to "[r]emand to the Bankruptcy Court for appropriate action on the pending motion for Otero to disgorge his fees, and for Lopez to be removed from office and [to] forfeit[] his fees." The district court dismissed

the claim against Otero on the ground that Kagan lacked standing to raise this claim in the context of a wrongful discharge suit. Kagan, 149 B.R. at 270-72. We agree. Moreover, although the district court did not address the claim against Lopez, that claim would suffer the same defect. In any event, since Kagan has presented no argument to support this prayer in his brief, the issue is waived. Ryan v. Royal Ins. Co., 916 F.2d 731, 734 (1st Cir. 1990) (issues adverted to on appeal in a perfunctory matter are deemed waived).

Claims Against Lopez and Otero

Kagan concedes that 29 L.P.R.A. 185a is the sole remedy for his claim of wrongful dismissal under Puerto Rico law. Weatherly v. International Paper Co., 648 F.Supp. 872 878 (D.P.R. 1986) (citing cases). However, he notes that

185a does not prohibit recovery when an employee "can establish that the employer committed an independent tortious act in the course of terminating employment." Id. at 877-78. Kagan asserts that in this case Lopez and Otero committed the independent tortious act of not correcting the record of dismissal and giving false bad references."2

2. We assume, without deciding, that the failure to provide corrected references and the supplying of false ones would be within "the course of terminating employment."

He seeks recovery under 31 L.P.R.A. 5141 which provides that

> A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done.

To state a claim for damages under 5141, a plaintiff must show (1) that the defendants owed him a duty to prevent the harm suffered; (2) that the duty was negligently breached; and (3) that the breach caused the plaintiff harm. Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co., 958 F.2d _1169, 1171 (1st Cir. 1992) (citing cases). In this case, Kagan has shown no basis for inferring that either Lopez or Otero had a legal duty to correct his references which had been given by the previous trustee Rodriguez ten months before Lopez and Otero arrived on the scene. Even assuming that Lopez and Otero were employers of Kagan, they were under no obligation to provide any references to him. See 48 Am.Jur.2d. Labor and Labor Relations 43 (in absence of statute "employer who

discharges an employee is not liable to the employee for his refusal to give the employee a 'character' or recommendation").3

3. Kagan's reliance on Ackerman v. Thompson, 356 Mo. 558, 202 S.W.2d 795 (1947), is in vain. In Ackerman, a state statute compelled the employer to provide a "service letter" upon terminating an employee. Puerto Rico has no such statute

Therefore, we cannot see why they would be required to provide "corrected" ones. "It is axiomatic that the failure to perform an act cannot give rise to a cause of action unless there was a legal duty to act." Torres v. United States, 621 F.2d 30, 33 (1st Cir. 1980) (applying Puerto Rico law). Nor would it be reasonable to require Lopez and Otero to provide "corrected" references

for an employee whom they never employed and whose performance they were therefore in no position to evaluate. Finally, while Lopez and Otero owe fiduciary duties to the bankrupt estate, see In Re Thompson, 965 F.2d 1136, 1145 (1st Cir. 1992), and to its creditors, In Re Consupak, Inc., 87 B.R. 529, 539 (Bankr.N.D.Ill. 1988); Bankruptcy Code 704(1), 11 U.S.C. 704(a) (duties of trustee), this duty does not extend to Kagan who is seeking damages not as a creditor of the estate but as a former employee of it.4

4. The district court found that Otero, as the estate's attorney, owed no duty to the employees of the estate. Kagan, 149 B.R. at 273. However, the district court did state that Lopez owed a duty to Kagan to act as a

reasonable employer. Id. Since we find that Lopez owed no duty to Kagan to provide corrected references, Kagan's claim would be subject to dismissal under the "reasonable employer"standard as well.

On appeal, Kagan also asserts that Lopez and Otero harmed him by providing false references. However, this claim was not raised below and therefore is not properly before us. Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979). In any event, Kagan admits that he never actually sought any references for a prospective employer from Lopez or Otero and that the uncorrected letter was never disseminated. His claim to have been harmed by receiving false references is devoid of merit.

Similarly without merit is Kagan's reliance on 107, 704 and 1106(a) of the Bankruptcy Code. Section 1106(a), through incorporation of 704, provides that "[t]he trustee shall unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest." 11 U.S.C. 704(7). Section 107 provides that "the bankruptcy court shall protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case nder this title." 11 U.S.C. 107(b)(2). Alleging that the uncorrected reference was defamatory, Kagan seeks to find in these provisions a duty on the part of the trustee to provide proper references and to revise false ones. However (1) any duty under the Bankruptcy Code to

prevent the dissemination of defamatory material is imposed on the court not the trustee; (2) the allegedly defamatory letter is not a "paper filed" in a bankruptcy case; and (3) as noted above, Kagan concedes that the letter was never disseminated.

Claim Against the Estate

Kagan asserts that he is entitled to relief under the federal common law for his wrongful dismissal. According to Kagan, he was dismissed because he tried to stop the bankruptcy trustee from violating federal law. Moreover, he alleges that the Puerto Rico wrongful dismissal statute provides insufficient protection because of the limited amount of compensation the statute provides. Citing the federal interest in seeing that federal law is not violated,

Kagan asks this court to formulate federal common law based on analogous state court decisions which have found a "public policy" exception to the employment-at-will doctrine where an employee is terminated for refusing to participate in illegal acts.

The instances in which a federal court has the authority to formulate a federal common law remedy are "few and restricted." Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963). Absent some statutory authorization to formulate substantive rules of decision, and none is alleged here, the court has authority to create a federal common law remedy only when it is "necessary to protect uniquely federal interests." Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, (1981) (quoting Banco Nacional de Cuba

v. Sabbatino, 376 U.S. 398, 426 (1964)). It is not enough that a remedy "supplements federal enforcement and fulfills the object of the statutory scheme." Id. at 642. Federal common law is appropriate only where "the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." Id. at 641. Moreover, "[i]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." Wallis v. Pan American Petroleum Corp., 384 U.S 63, 68 (1966).

We find no such "uniquely federal interests" in this case which would warrant the formulation of federal common law. Furthermore, no conflict exists here between the federal policy to be promoted and the application of state law. The Commonwealth of Puerto Rico, like most states, already provides protection for those dismissed for acting in accordance with law. Finally, the rationale on which Kagan relies--i.e., that the court ought to formulate a federal common law remedy to protect those dismissed for upholding federal law--would apply to all federal regulatory schemes. Yet, Congress has chosen to enact specific protections for "whistle-blowers" where it has thought appropriate. See Note, Protecting Employees at Will Against Wrongful Discharge: the Public

Policy Exception, 96 Harv.L.Rev. 1931, 1934 (1983) (listing federal statutes). In adopting Kagan's rationale, we would not only be extending this protection into areas where Congress has not thought appropriate but we would be ignoring the Supreme Court's advisory that the appropriate occasions for the formulation of federal common law are "few and restricted." Wheeldin, 373 U.S. at 651. We decline to do so. Kagan calls our attention to Barany v. Buller, 670 F.2d 726 (7th Cir. 1982). In Barany, the court formulated a federal common law remedy for reinstatement of federal credit union employees allegedly dismissed in violation of federal laws. This case is distinguishable from Barany in two ways. First, the decision in Barany was based in part on the congressional desire to "insure uniform

development in credit unions." Id. at 733. In contrast, no similar desire for national uniformity is found in congressional control over bankruptcy law. Butner v. United States, 440 U.S. 48, 54 n.9 (1979) (bankruptcy law frequently recognizes state substantive law). Second, the rationale of Barany--that the federalization of the governance of an institution makes it of "uniquely federal interest"--was limited to federal credit unions and similar federal institutions. Barany, 670 F.2d at 734. We see no principled way to limit the rationale for the remedy sought in the present case.5

5. We also note that the Fourth Circuit has disagreed with the Barany holding. Ridenour v. Andrews Federal Credit Union, 897 F.2d 715, 721-22 (4th Cir. 1990) (declining to fashion

federal remedy as a matter of federal common law to create cause of action for federal credit union employees challenging adverse employment actions). The opinion of the district court is affirmed.